

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

REVIEW OF NONPOSTAL SERVICES

Docket No. MC2008-1 (Phase IIR)

UNITED STATES POSTAL SERVICE  
REPLY COMMENTS ON REMAND  
(January 23, 2012)

Order No. 1043 requested initial and reply comments regarding the Court's decision in LePage's 2000, Inc. v. Postal Regulatory Comm'n, 642 F.3d 225 (D.C. Cir. 2011), which vacated and remanded Order No. 392 as it applied to commercial license agreements between the Postal Service and private sector producers of mailing and shipping products (including LePage's). In addition to the Postal Service, three parties filed initial comments: LePage's, Pitney Bowes, and the Public Representative. LePage's argues that, under the guidelines established by the Court, the only permissible outcome of this docket is for the Commission to allow the continuation of commercial mailing and shipping licenses, either as "postal services" or "nonpostal services." Pitney Bowes and the Public Representative, on the other hand, argue that the Commission should reinstate its decision in Order No. 392 that these licenses be terminated as unauthorized "nonpostal services." The Postal Service hereby files its reply comments.<sup>1</sup>

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<sup>1</sup> The Postal Service focuses here on the most salient aspects of the initial comments of other parties as they relate to the resolution of this docket. The fact that the Postal Service may not respond to a specific assertion made in another party's initial comments should not be construed as an endorsement or admission of that assertion.

**I. The Public Representative's Comments Are Inconsistent with the Statute, Commission Precedent, and the Court's Decision**

The Public Representative urges the Commission to re-affirm its determination in Order No. 392 that there is not a “public need,” within the meaning of 39 U.S.C. § 404(e)(3)(A), for the mailing and shipping licenses within the commercial licensing program. PR Comments at 5-6. He recognizes that the Commission cannot legitimately assert, as it did in Order No. 392, that there is a lack of “sufficient evidentiary support” for concluding that the benefits of commercial licensing identified in Phase I apply equally to commercial licenses for mailing and shipping products. Id. at 5 (noting that “the Commission should carefully clarify that the same benefits that would accrue to commercial licensing as a whole would also accrue to commercial licensing with respect to intellectual property to be used on mailing and shipping supplies.”). Instead, he urges the Commission to find that, despite such benefits, “the potential harm to the public with respect to ‘customer confusion’” justifies a finding that such licensing fails to meet a “public need.” Id. While he admits that consideration of the “economic effects of the [licensed] product” is an “inappropriate metric” based on the Court’s decision, id. 5-6, he claims that consideration of “customer confusion” would be consistent with the Court’s decision because it would “fall under the category of the product’s ‘usefulness.’” Id. at 6 n.8.

The Public Representative’s reasoning conflicts with the plain language of the Act, as interpreted in the Court’s decision. As an initial matter, the language of Order No. 154 cited by the Court and the Public Representative referred to the “usefulness” of the *service*, which, as the Court noted repeatedly, is in this

context “licensing” rather than the provision of the licensed product. Indeed, the Court immediately followed its recitation of the “public need” factors employed in Phase I, including “usefulness,” by noting that those factors “focus on the public need for the service, not the products resulting from that service.” 642 F.3d at 233. And, as discussed in the Postal Service’s initial comments, the Court clearly indicated that it is improper under the plain language of the Act for the Commission to predicate its findings under Section 404(e)(3) on the products that result from licensing, rather than the service being provided by the Postal Service. Thus, the Public Representative’s claim that the Commission may appropriately consider the “product’s ‘usefulness’” is contradicted by the Court’s decision.

Furthermore, despite the Public Representative’s claim to the contrary, the Court’s discussion as to why it is improper under the plain language of the Act to consider the “economic effect of the *products* that result from licensing,” *id.* at 232 (emphasis in original), clearly encompasses the Commission’s concerns over purported “customer confusion.” The Court found that the Commission’s “customer confusion” rationale is predicated on the effect of the products being licensed, noting that the Commission had determined in Order No. 392 “that the Bubblewrap program *products* will cause customer confusion and will result in market distortion.” *Id.* (emphasis in original). Thus, finding a lack of “public need” on the basis of the “customer confusion” rationale would run afoul of the Court’s direction regarding the proper level of analysis under Section 404(e). Moreover, the Court’s reference to “economic effects” was simply a shorthand way of

referring to the Commission's expressed concerns over "customer confusion and...market distortion," id., both of which are based on concerns over how the licensed products themselves will affect the marketplace for mailing and shipping supplies.<sup>2</sup>

The Public Representative also argues that Postal Service-branded mailing and shipping products sold at non-postal retail locations cannot be a "postal service" because the Postal Service is not selling those products to the end user. PR Comments at 2-4. According to the Public Representative, "the seller's identity" is the key factor when determining whether something can be a "postal service," and which distinguishes mailing and shipping licenses within the commercial licensing program from postal products such as ReadyPost. Id. However, as the Postal Service pointed out in its initial comments, the Commission has appropriately not treated the seller's identity as being dispositive in determining whether a particular product is a "postal service," as demonstrated clearly by the Customized Postage product. See also 642 F.3d at 231 (noting that a focus on the seller's identity, as opposed to the functional relationship between the product and the use of the mail, would conflict with the Commission's application of the definition of "postal services" in Phase I).

The Commission's recognition that Customized Postage is a "postal service" also belies the Public Representative's claim that if the Postal Service's involvement in a product is limited to licensing, that product must inherently be a

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<sup>2</sup> Finally, even if the Public Representative were correct that consideration of "customer confusion" is an appropriate consideration under Section 404(e)(3), as interpreted by the Court, he presents no evidence that any such "customer confusion" actually exists.

“nonpostal service.” Certainly, much of the licensing conducted by the Postal Service, see Postal Service Initial Response to Order No. 74 at 20-23, can be appropriately considered to be “nonpostal services,” following the Court’s decision in U.S. Postal Serv. v. Postal Regulatory Comm’n, 599 F.3d 705 (D.C. Cir. 2010). Furthermore, if one focuses on the commercial licensing program, and treats the act of licensing as being distinct from the product being licensed (which, as the Court noted, the Commission did in Phase I), then it is also permissible to consider the program to be a “nonpostal service.”<sup>3</sup> But, if the Commission determines that it is appropriate to distinguish between licenses based on the nature of the licensed products, it must conclude that mailing and shipping licenses are “postal services,” considering the definition of “postal service” focuses on the functional utility of the product being considered. Cf. 642 F.3d at 231 (noting that the Commission has in applying the definition of “postal service” “assessed whether the *products* at issue—as opposed to the activity being performed by the Postal Service—could ‘reasonably be viewed as ancillary to the carriage of mail.’”) (citation omitted) (emphasis in original).

The Public Representative also asserts that treating products that are not sold by the Postal Service as “postal services” is problematic because the Commission’s “oversight authority with respect to whether other entities are following the requirements of Title 39 is virtually nonexistent,” meaning the Postal Service would be able to “effectively escape much of the oversight and regulation

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<sup>3</sup> Indeed, as the Postal Service noted in its initial comments, the most straightforward approach in resolving this docket is for the Commission to simply affirm the entire commercial licensing program—including the mailing and shipping licenses—using its Phase I reasoning, and to regulate that program pursuant to 39 U.S.C. § 404(e)(5).

envisioned under the statutory scheme.” PR Comments at 4. No such concerns were raised by the same Public Representative, or by the Commission, about Customized Postage, which is also sold by “other entities,” so this concern does not provide a reasoned basis for distinguishing between the two products. Nor does the argument make sense: as with Customized Postage vendors, private sector producers of Postal Service-branded mailing and shipping products may only provide such products with the Postal Service’s authorization. This fact means that the Postal Service, which is directly regulated by the Commission, can impose conditions on those licensees if such conditions are appropriately deemed by the Commission, acting within the constraints of its statutory authority, to be necessary for the Postal Service to comply with specific requirements of title 39. This is true regardless of whether these licenses are considered to be “postal services” or “nonpostal services,” since under either designation they are regulated under the provisions of chapter 36.

## **II. Pitney Bowes’ Comments Completely Disregard the Court’s Decision**

Pitney Bowes dedicates most of its comments to criticizing the Commission’s decision in Phase I, arguing that it was inconsistent with the purposes of Section 404(e), adopts an unduly expansive interpretation of “public need” under Section 404(e)(3)(A), and reads the private sector prong of Section 404(e)(3)(B) “out of the statute.” PB Comments at 5-7, 15-17. Pitney Bowes then argues that the Commission adopted a more reasoned approach in Order No. 392. Id. at 7-11. Remarkably, Pitney Bowes does not even attempt to reconcile its statements regarding Section 404(e), the Phase I Order, or the

Phase II Order with the Court's decision: it is as if the Court made no statements on those matters.<sup>4</sup> In fact, the only instance where Pitney Bowes even discusses the Court's decision is with respect to its discussion of whether these licenses can constitute "postal services." Id. at 11-15.

Pitney Bowes first argues that the Commission erred in Phase I by considering and approving licensing "as a general service," stating that the conclusion was "overbroad" and leads "to results that are contrary to the PAEA." Id. at 5-6. In particular, Pitney Bowes argues that the Phase I decision, at least as interpreted by the Postal Service, "necessarily compels the approval of any future licensing activity," which "makes no sense" because it would "authorize[ ] the Postal Service to engage in a virtually limitless range of new nonpostal activities through the expediency of licensing arrangements, even though the Postal Service would be prohibited from providing the same activities directly under the PAEA." Id. at 6.

This argument is specious. Most fundamentally, Pitney Bowes ignores the fact that, with respect to the licenses being considered here, the Postal Service is not "prohibited from providing the same activities directly under the PAEA." The licensed products here all relate to the Postal Service's "core business," and are "indistinguishable" from the postal products that the Postal Service is selling directly today. 642 F.3d at 226, 231-32. As such, Pitney Bowes' repeated assertion that the continuation of this licensing activity would allow the Postal Service to deviate from its "core business" rings hollow.

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<sup>4</sup> This is in contrast to the Public Representative, who attempted to grapple, though unsuccessfully, with how the Commission could reach the same decision as it did in Order No. 392 while maintaining consistency with the Court's decision.

In addition, Pitney Bowes' claim that the continuation of commercial licensing for mailing and shipping products would leave the Commission powerless to ensure that the Postal Service acts appropriately in the future, because the Commission would be "compell[ed] to approve any future licensing agreements," and thus would be granting "potentially unlimited" authority to the Postal Service, ignores the fact that the Commission has continuing authority to regulate Postal Service licensing, pursuant to 39 U.S.C. § 404(e)(5). This will ensure that "transparency" and "accountability" (PB Comments at 7) are protected. Nor has the Postal Service ever argued to the contrary, as Pitney Bowes suggests. Rather, the Postal Service has argued that there is no basis for the Commission to approve commercial licenses with respect to non-mailing and shipping products, while disallowing licenses for mailing and shipping products.

In addition, Pitney Bowes' criticism of Order No. 154's interpretation of Section 404(e)(3) as it applies to commercial licensing, and its endorsement of Order No. 392's approach, completely disregards the Court's decision. Indeed, Pitney Bowes' defense of Order No. 392 spends a lot of time summarizing what the Commission found in that Order, and little time discussing whether the Commission's findings are consistent with the decision of the Court.

Pitney Bowes first argues that the Commission's approval of licensing in Phase I contradicted the statute, because "[a]pproval of licensing...without relation to any specific end product or group of end products effectively reads section 404(e)(3)(B) out of the statute." PB Comments at 7. According to Pitney Bowes, the relevant question "is not whether the private sector can license the

Postal Service’s intellectual property,” and therefore “[t]he Commission properly concluded [in Order No. 392] that mailing and shipping supplies are widely available in the private sector and that the Postal Service’s licensing activities would not expand the range or quality of the mailing and shipping supplies available to consumers.” Id. at 8-9. However, this argument completely ignores the fact that the Court specifically upheld the Commission’s approach in Phase I as being consistent with the statute, because it appropriately focused on the service being offered by the Postal Service (licensing) rather than the products that result from licensing, while noting that the approach followed in Phase II—and urged by Pitney Bowes in its comments—conflicted with the language of the Act. See 642 F.3d at 233-34 (“Therefore, for the Commission to review the private sector factor by assessing [the] ability of the private sector to provide similar products would bring the Commission into conflict...with the Act.”).<sup>5</sup>

Pitney Bowes’ criticism of the Phase I application of the “public need” factor to licensing similarly ignores the Court’s decision. Pitney Bowes argues that the Commission “too often conflated the needs of the Postal Service with the needs of the public,” such as in its approval of OLRP. PB Comments at 15. It then argues that it is “critical” for the Commission to assess “public need or consumer demand for the service in relation to some end product or group of products,” because doing so “allows the Commission to consider the direct and indirect consumer and economic effects of the nonpostal service.” Id. at 16. It

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<sup>5</sup> As Pitney Bowes itself recognizes elsewhere in its comments, the Court found that Section 404(e) “requires the Commission to assess the...service ‘offered by’ the Postal Service.” PB Comments at 14.

also claims that this approach “was implicit in the Commission’s Phase I decision.” Id.

There are two problems with these assertions. First, the notion that Pitney Bowes’ approach was “implicit” in the Phase I decision is incorrect: the presence of the brand generates revenues and has promotional value, regardless of what end product it is placed on. So, one need not assess the “nature of the licensed consumer good” (id. at 2) itself to know that the act of licensing will confer the benefits found by the Commission in Phase I. Indeed, the Court specifically noted this fact, as it found that the Commission’s Phase I approach focused on the service being offered by the Postal Service (licensing), and not the products that result from licensing. 642 F.3d at 233. Second, Pitney Bowes’ argument that “public need” must take into account the product being licensed is directly contradictory to the Court’s interpretation of Section 404(e)(3). As discussed both in the Postal Service’s initial comments and elsewhere in these comments, the Court noted that a product-level analysis is inconsistent with the Act, because it confuses the licensed product with the “service being offered by the Postal Service.”<sup>6</sup>

Remarkably, Pitney Bowes does not attempt to reconcile its arguments concerning Section 404(e)(3) with the Court’s decision. While Pitney Bowes may feel free to disregard the Court’s decision, the Commission cannot, and is therefore not in a position to reconsider its Phase I approach regarding the

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<sup>6</sup> Pitney Bowes claims that considering the effects of the end product “also explains the apparent inconsistency in the application of the public need test to the OLRP program in Phase I and to commercial licensing in Phase II.” PB Comments at 17. This does nothing, however, to recommend the Phase II approach, because, as the Court found, it was impermissible for the Commission to consider the effects of the end product when applying Section 404(e)(3).

“public need” and “private sector” prongs of Section 404(e)(3) as they apply to licensing. The Commission did not appeal the Court’s decision, which is therefore final and binding on the Commission. See, e.g., Belbacha v. Bush, 520 F.3d 452, 457 (D.C. Cir. 2008) (appeals court decision is binding on later appellate panels and on lower court); City of Cleveland v. Fed. Power Comm’n, 561 F.2d 344, 346-48 (D.C. Cir. 1977) (same rule applies to administrative agencies). As the Court noted in City of Cleveland, a Court decision remanding litigation to an agency “establishes the law binding further action in the litigation” by the agency. 561 F.2d at 346. The agency must therefore follow the Court’s mandate, which encompasses “everything decided, either expressly or by necessary implication,” and the agency is “without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of (the) court deciding the case.” Id. at 346-48 (citation omitted). Therefore, in this proceeding the Commission must follow the analysis set forth in the Court’s decision, including its discussion as to the proper interpretation of Section 404(e) as applied to these licenses.

Pitney Bowes’ other attempts to justify the Order No. 392 decision similarly fail to accord with the Court’s decision. Pitney Bowes asserts that the Commission “appropriately distinguished between different types of licensing activities based on the purpose of the license.” PB Comments at 7. According to Pitney Bowes, unlike other licenses within the commercial licensing program, mailing and shipping licenses primarily serve a “commercial purpose” of “generat[ing] revenue through the sale of commercial consumer goods,” and that

“[t]he promotional value, if any, is incidental.” Id. at 3, 7-8. But, as the Court found, this assertion lacks an evidentiary basis: the record contains no evidence demonstrating that the purpose of the Postal Service in licensing is different based on the product being licensed. See 642 F.3d at 232 (noting that “the evidence the Commission relied on for the benefits of the commercial licensing program...did not distinguish between different types of commercial licensing.”).

The Court also indicated that, in terms of the benefits from licensing identified by the Commission in Phase I, there is no difference between mailing and shipping licenses and other licenses. Regarding OLRP, a program that like commercial licensing involves items that are both related and unrelated to the use of the mail (a fact that Pitney Bowes does not recognize when holding OLRP out as the quintessential example of its “promotional licensing” category), the Court noted that it “[did] not understand” how the benefits identified by the Commission—“leverag[ing] the Postal Service’s brand” and “through the revenues generated...support[ing] the Postal Service’s core mission” (Order No. 154 at 49)—would not apply to mailing and shipping licenses, considering the two are “substantially similar.” 642 F.3d at 232. Furthermore, the Commission found in Phase I that licensing “generat[es] revenues” and “promotes and gives recognition to the [Postal Service’s] brand, Order No. 154 at 73, a finding that, as the Public Representative recognizes, it cannot seriously claim is inapplicable to mailing and shipping licensing. Thus, Pitney Bowes cannot reasonably distinguish between mailing and shipping licenses and other commercial licenses on the basis that the former “generate[ ] revenue through the sale of commercial

goods,” when all licensing does so. Nor can Pitney Bowes reasonably claim that mailing and shipping licenses do not promote the Postal Service’s brand in the exact same way as all other commercial licenses, and OLRP. There is simply no evidentiary basis for the conclusion that mailing and shipping licenses have a “purpose” different from other licensing.

Pitney Bowes also seeks to buttress the Commission’s finding in Order No. 392 that mailing and shipping licenses affect the market in a way that other licenses do not. PB Comments at 10-11. But, as is the case for the rest of its comments, Pitney Bowes fails to discuss whether those concerns are relevant under the Court’s interpretation of Section 404(e)(3). Indeed, Pitney Bowes effectively admits that they are not, because it notes that the Commission made these findings concerning the “consumer and economic effects” of these licenses only because it considered the “end product.” Id. at 16. In fact, Pitney Bowes repeatedly asserts that this approach of considering the “nature of the licensed consumer good” was correct. Id. at 5. See also id. at 16 (arguing that the Commission must assess “public need or consumer demand for the service in relation to some end product or group of products.”). But, under the Court’s decision consideration of the “end product” resulting from licensing is precisely the problem with the Commission’s Phase II Order.<sup>7</sup>

The only instance in which Pitney Bowes seeks to actually address the Court’s decision is in its discussion of whether Postal Service-branded mailing

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<sup>7</sup> Pitney Bowes’ comments regarding the importance of a product-level analysis in applying Section 404(e) is also directly contradictory to its statement elsewhere in its comments that while a “product-level analysis is appropriate for items proposed for classification as postal services,” it is not appropriate for “nonpostal services” because the Commission is required to review the “service offered by the Postal Service.” PB Comments at 14-15.

and shipping products can be considered “postal services,” and in doing so claims that the Court “misses the mark.” Id. at 13. But, simply arguing that the Court’s decision is wrong is not a proper basis for rendering a decision on remand, because, as discussed above, that decision is binding on the Commission. For the same reason, Pitney Bowes’ assertion that it is “not fair” that the Court criticized the Commission’s failure to explain why mailing and shipping licenses are not “postal services,” id., is completely beside the point, because the Court clearly directed the Commission to consider this issue on remand.

Pitney Bowes also seeks to downplay the Court’s findings concerning the “postal” nature of these licensed products. Despite its claims, id., the Court did not simply “reference[ ]” the argument that Postal Service-branded mailing and shipping supplies are similar to the products that the Postal Service sells directly, but affirmatively found that the products were “indistinguishable” and that any attempt to claim otherwise was “untenable.” 642 F.3d at 231-32. Pitney Bowes does not challenge these findings (which it cannot do even if it wished), but instead claims that it is “irrelevant” to compare postal products and licensed products sold by private sector licensees because the latter only involves licensing, while the former involves direct sales by the Postal Service. PB Comments at 14. The fallacy of this argument has been addressed by the Postal Service both in its initial comments and in its discussion of the Public Representative’s comments. Nor can Pitney Bowes have it both ways, by arguing that the Commission cannot consider the licensed products when

determining whether they are “postal,” but should consider them when applying the “nonpostal” language. Simply put, if the Commission decides to consider the licensed products as part of this docket, then it must—consistent with its Phase I approach—consider whether they are “postal services.” See Order No. 154 at 61 n.118 (finding Stamp Fulfillment Services to be a “postal service” even though it had not been originally proposed as a “postal service”).

### **III. Conclusion**

Neither the Public Representative nor Pitney Bowes provide a reasoned rationale for how the Commission can, consistent with the decision of the Court, re-affirm its analysis in Order No. 392 regarding mailing and shipping licenses. The record is sufficient for the Commission to conclude that those licenses should be authorized to continue as “nonpostal services” for the same reasons that all other commercial licenses were authorized to continue in Phase I. Alternatively, if the Commission decides to resolve this docket by reference to the licensed products, the record is sufficient for it to conclude that they are “postal services” within the meaning of the statute. Any other outcome would violate the Court’s decision, and would lack a substantial evidentiary basis.

Respectfully submitted,

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